



**Makitoni & 2 others v Mukhwana (Suing as the administrator of the Estate of Teresina Musebe) & 3 others; Masinde (Suing as the administrator of the Estate of Michael Watamba) (Interested Party) (Environmental and Land Originating Summons 109 of 2000) [2025] KEELC 1332 (KLR) (19 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1332 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 109 OF 2000**

**CK NZILI, J**

**MARCH 19, 2025**

**BETWEEN**

**JAMES MAYEKU MAKITONI ..... 1<sup>ST</sup> PLAINTIFF**

**PAULINE KHISA MAKITONI ..... 2<sup>ND</sup> PLAINTIFF**

**FRANCIS SIMIYU MAKITONI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**WENSLAUSE MUKHWANA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF TERESINA MUSEBE) ..... 1<sup>ST</sup> DEFENDANT**

**TOM MACHABE ..... 2<sup>ND</sup> DEFENDANT**

**CHRISPINUS WEKESA ..... 3<sup>RD</sup> DEFENDANT**

**URBANUS M WEKESA ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**LUTUKAYI J MASINDE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MICHAEL WATAMBA) ..... INTERESTED PARTY**

**RULING**

1. When this matter came up for hearing on 27/1/2025, learned counsels for the plaintiff, Mrs. Wekhomba and Miss Arunga, told the court that this matter initially had a title deed issued to their clients on 13/9/2018. Learned counsels said that even though the judgment was set aside, the title deed was not revoked, and therefore, it is not in the interest of their clients to proceed with the matter.



- Equally, learned counsels told the court that the interested party has also obtained a title deed which their clients are not objecting to. They urged the court to allow them to withdraw the suit.
2. The plaintiffs, in support of their oral application for withdrawal of the suit, rely on written submissions dated 7/2/2025. It is submitted that the initial judgment was delivered on 21/12/2001, in which the plaintiffs were awarded 11 acres out of L.R No. East Bukusu/North Nalondo/1658. The plaintiffs submitted that the judgment was set aside on 6/5/2002. However, after the defendants slept on their rights, it was reinstated on 29/3/2006, following which the Deputy Registrar executed the subdivisions and transfer documents, excising 11 acres from the original portion, and a title deed was issued thereafter.
  3. Further, the plaintiffs submitted that the defendants brought an application to set aside the judgment, which the court allowed vide a ruling dated 6/11/2019, for the matter to start denovo. However, the court did not mention the cancellation of the title deed issued to the plaintiffs yet; there is a procedure by which a title deed is expressly canceled and the restoration of the previous title, which gave rise to the canceled title. In view of the fact that the title has been granted and registered in the names of the plaintiffs, they urge the court to find that they have no genuine interest in the suit and wish to withdraw it, for the defendants have no counterclaim against them.
  4. The plaintiffs submitted that an applicant must satisfy the court in Section 26 of the Land Registration Act to impeach a title deed. In this case, the title held by them has not been challenged by the defendants by way of a counterclaim. Further, it is submitted that the ruling setting aside the judgment did not touch on the validity of the title deed, which stands indefeasible. Reliance was placed on *Evans Wambugu Gachagi -vs- Simon Wainaina Gatwiki & Others* [2014] eKLR.
  5. Again, the plaintiffs submitted that they can withdraw the suit since it is overtaken by events. Reliance is placed on *Nicholas Kiptoo Arap Korir Salat -vs- IEBC & Others*, SC Appl. No. 16 of 2014, where the court held that a party's right to withdraw a matter before the court could not be taken away and that a court cannot bar a party from withdrawing a matter; otherwise, all that the court does is to make an order as to costs, where it deems it fit.
  6. The plaintiffs relied on *Beijing Industrial Designing & Researching Institute -vs- Lagoon Development Ltd* [2015] eKLR on the proposition that a court ought not to stand in the way of a plaintiff who wishes to discontinue his suit, subject to consideration of costs.
  7. Similarly, the plaintiffs submit that though the general rule is that costs follow the event, in the instant case, if they are allowed to exercise their legal right to withdraw the suit, they had come to court to enforce their right to property, which was granted but the defendants have dragged on the matter endlessly, only for them incur unnecessary legal costs. In this case, being the successful parties, they are entitled to costs.
  8. The interested party relies on written submissions dated 3/2/2025. It is submitted that whereas under Order 25 Rule (1) of the Civil Procedure Rules, though a party may withdraw a suit, the plaintiffs are not entitled to withdraw the suit, for it has been set down for hearing severally, although the matter has not proceeded. Reliance is placed on *John Ochanda -vs- Telkom (K) Ltd* SC Appl. No. 25 of 2015. The interested party further submits that, since the matter has been listed for hearing many times, written consent must be sought first from all the parties.
  9. In addition, the interested party submitted that there is no application or written notice made by the plaintiffs and served upon all the parties craving for leave to withdraw the suit. The interested party also submitted that Order 25 Rule (1) of the Civil Procedure Rules presents three scenarios regarding discontinuance of suits or withdrawal of claims.



10. The interested party takes the view that given the cited case law by the Supreme Court of Kenya, it does not mean that the plaintiff has a right to discontinue his suit in all and sundry cases; otherwise, the requirement for leave would become a mere formality. Therefore, the interested party urged the court to find that the request to withdraw the suit is not in compliance with the law and decline to allow it unless the plaintiffs seek consent from all the parties to the suit or file a formal application in accordance with Order 25 Rule 2(1) and (2) of the Civil Procedure Rules.
11. The defendants submitted that they are in court because the ruling delivered on 6/11/2019 quashed the *ex parte* proceedings and the judgment for the matter to start *denovo*, in order to allow them defend the action by the plaintiffs against the suit properties. Learned counsel for the defendants submitted that it was unprocedural for the plaintiffs and the interested party to relitigate or review the merits of the ruling setting aside the *ex parte* judgment, more so at this stage when parties have been before court severally, setting down the suit for hearing, but all in vain.
12. Learned counsel submitted that what the plaintiffs and the interested party were doing was a rethink or an afterthought, given that the defendants have a legitimate claim to the suit land. Again, learned counsel submitted that the ruling that paved the way for a hearing *denovo* had canceled the title deed issued to the plaintiffs, and that is why the hearing dates for the matter have been taken severally; otherwise, if the plaintiffs and interested party had different views of the ruling, they should have filed the appropriate formal application a while ago.
13. In a rejoinder the plaintiffs reiterated that it is not true that the defendants were condemned unheard, since they actively participated in the matter. The plaintiffs submitted that human beings can think and rethink, and since there is no formal suit challenging the title deed as irregularly or unprocedurally issued, after many years of its issuance, there could be no business in proceeding with the matter.
14. Order 25 Rule 1 of the Civil Procedure Rules provides that a plaintiff may at any time before the setting down of a suit for hearing, by notice in writing served upon all parties, wholly discontinue his suit against all or any of the defendants, or may withdraw any part of his claim. Such discontinuance or withdrawal shall not be a defense to any subsequent action. Under Order 25 Rule 2 of the Civil Procedure Rules, the court retains the discretion to make any further order as may be necessary for the implementation and execution of the terms of the decree. It is trite law that a party has a legal right to withdraw a suit through the prescribed format.
15. In *PIL Kenya Ltd -vs- Joseph Oppong* [2001] eKLR, the Court of Appeal, held that a party under Order 25 Rule 1 of the Civil Procedure Rules does not require leave of court to withdraw a suit, nor does he need a court order to give effect to the withdrawal. In *Beijing Industrial Designing & Researching Institute -vs- Lagoon Development Ltd* [2015] eKLR, the Court of Appeal held that the right to withdraw a suit is absolute and cannot be curtailed by the court.
16. In *Mukindia & Another -vs- Consolidated Bank (K) Ltd & Others E&L Case No. E001 and 2 of 2022* (Consolidated) KEELC 15127 [KLR] (30<sup>th</sup> November 2022) (Ruling), this court observed that there was no basis in law to object to the withdrawal, more so, when the defendants had given no reason on why the court should deny a party the right of withdrawing the suit. In *Priscilla Nyambura Njue -vs- Geochem Middle East Ltd; Kenya Bureau of Standards (IP)* [2021] eKLR, the court observed that inevitable consequences arise from the withdrawal, which prevents a party from revoking the withdrawal, or the court reinstating a suit once withdrawn.
17. Applying the foregoing case law, the plaintiffs have not filed a formal notice to withdraw the suit. They have made an oral application on the basis that the prevailing events have overtaken the relevance of the suit, since a title deed has been issued in their favor, which the defendants have not challenged by way



of a counterclaim. The plaintiffs urge the court to find that they are no longer interested in pursuing the matter under the circumstances.

18. The defendants and interested party oppose the withdrawal since the issues before the court are yet to be heard and determined, after the initial judgment leading to the issuance of the title deed was set aside. In response, the plaintiffs have accused the defendants of inaction, delay, and maintaining a suit that they have not expressly challenged or sought for the revocation of the title deed.
19. In *Mae Properties Ltd -vs- Joseph Kibe & Another* [2017] KECA 238 [KLR], the court observed that there is always the need for the expeditious pursuit of justice; the court frowns upon indolence and dilatoriness. The court cited with approval *Martin Kabaya -vs- David Mungania Kiambi Nyeri Court of Appeal No. 12 of 2015*, that judicial proceedings should be concluded in a timely manner as is a desideratum of a rational society. Justice should not be encumbered by sloth or inattention on the part of those who seek it, which is a pain, a bother and expensive, leading to a dead weight that the judiciary bears as backlog.
20. What the court is faced with is an oral application to withdraw the suit. Order 25 of the Civil Procedure Rules does not mention an oral application but a notice to withdraw the suit duly served upon the other parties. Equally, the Order does not bar a party from putting an oral request to have his claim marked withdrawn or abandoned. A court may, in either case, not allow a plaintiff or any other party to use the right to discontinue or withdraw the suit so as to abuse the process of the court or to defeat the ends of justice. In the Beijing Case, the court observed that where a defendant has acquired a right or is protected by an order, a plaintiff seeking a right to discontinue a suit or withdraw a claim under Order 25 of the Civil Procedure Rules, must seek the sanctions and endorsement of the court. The court has the discretion to reject or allow the leave on terms.
21. In Beijing (supra) the court cited *New Zealand Shipping -vs- Societe Des Ateliers Et Chantiers De France (1919) Ac 1*, that a man shall not be allowed to take advantage of a condition which he brought about so as to defeat a suit.
22. From the foregoing, the plaintiffs have failed to comply with the law and give a formal notice of withdrawal of the suit. In the circumstances obtaining, the court declines the invitation to withdraw the suit without a formal application or notice. None of the parties has appealed or sought for review on the implications of the ruling setting aside the initial judgment from which the plaintiffs obtained a title deed. Equally, the court will not dwell on the issue of whether the defendants' defense is questioning the existing title deed or a former title deed without a formal application to that effect. The jurisdiction of the court on whether or not to allow a discontinuance or withdrawal of the suit is limited. Without a formal notice of withdrawal and objection of the same, the court declines to make conclusive findings on the issues. The plaintiffs, if they wish to exercise their right under Order 25 of the Civil Procedure Rules, are directed to file and serve upon all the parties a formal notice to that effect within 14 days or otherwise; the suit shall be dismissed for non-prosecution after 30 days from the date hereof.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 19TH DAY OF MARCH 2025.**

In the presence of:

Court Assistant - Chemutai

Onsumo for the Defendants present

Arunga for the plaintiff absent

**HON. C.K. NZILI**



**JUDGE, ELC KITALE.**

